IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Appellant,	)	
	)	
v.	)	No. SC94096
	)	
MARCUS MERRITT,	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
TWENTY-SECOND JUDICIAL CIRCUIT
THE HONORABLE JOHN F. GARVEY, JR., JUDGE

RESPONDENT'S AMENDED BRIEF

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JURISDICTIONAL STATEMENT

On January 23, 2013, in the Circuit Court of St. Louis City, Cause No. 1222-CR06177, the State of Missouri charged that Respondent, Mr. Marcus Merritt ("Mr. Merritt"), committed three counts of the class C felony of unlawful possession of a weapon, in violation of § 571.070, RSMo. Cum. Supp. 2012, and other counts.[1] On May 22, 2013, Mr. Merritt filed his "motion to dismiss indictment with prejudice as § 571.070 violates the Missouri constitution as applied." In his motion, Mr. Merritt alleged that the trial court should dismiss the indictment with prejudice because § 571.070 violates Article I, §§ 13 and 23 of the Missouri Constitution, in that it is unconstitutionally retrospective, and because it is an absolute ban on his right to possess a firearm solely because he is a convicted felon and the ban is not a reasonable time, place, or manner restriction under the police power of the State.

The State filed its response on July 25, 2013. The State's response addressed Mr. Merritt's claim that § 571.070 violates Article I, § 13 of the Missouri Constitution, but it did not address Mr. Merritt's claim that § 571.070 violates Article I, § 23 of the Missouri State Constitution. On the same day, the trial court entered its order, granting Mr. Merritt's motion to dismiss Counts I, II, and III, over the State's objection, and dismissed Counts I, II, and III with prejudice. Mr. Merritt pled guilty to the remaining counts on the same day. This appeal by the state follows. Because this appeal involves the validity of a statute of the State of Missouri, this Court has exclusive jurisdiction. Mo. Const. Art. V, § 3.

[1] All statutory references are to RSMo. 2000 unless otherwise indicated.

STATEMENT OF FACTS

On January 23, 2013, in the Circuit Court of St. Louis City, Cause No. 1222-CR06177 the State of Missouri charged that Respondent, Mr. Merritt, committed three counts of the class C felony of unlawful possession of a firearm, in violation of § 571.070, RSMo. Cum. Supp. 2012, along with other counts (L.F. 13-14).

On May 22, 2013, Mr. Merritt filed his "motion to dismiss indictment with prejudice as § 571.070 violates the Missouri constitution as applied" (L.F. 15-24). In his motion, Mr. Merritt alleged that the trial court should dismiss the indictment with prejudice because § 571.070 violates Article I, §§ 13 and 23 of the Missouri constitution in that it is unconstitutionally retrospective and because it is an absolute ban on his right to possess a firearm solely because he is a convicted felon and the ban is not a reasonable time, place, or manner restriction under the police power of the State (L.F. 15).

The State filed its response on July 25, 2013 (L.F. 25-31). The State's response addressed Mr. Merritt's claim that § 571.070 violates Article I, § 13 of the Missouri Constitution, but it did not address Mr. Merritt's claim that § 571.070, violates Article I, § 23 of the Missouri State Constitution (L.F. 25-31). On the same day, the trial court entered its order, stating the following:

> After hearing on the defense's motion to dismiss Counts I, II, and III, the Court grants the motion.
>
> Counts I, II, and III (unlawful possession of a firearm) are hereby dismissed, over State's objection, with prejudice.

(L.F. 32). On the same day, Mr. Merritt pled guilty to the remaining counts (L.F. 2, 33-35). This appeal by the state follows.

POINT RELIED ON - I

The trial court did not err in dismissing Counts I, II, and III of the felony indictment against Mr. Merritt in that § 571.070, violates Article I, § 23 of the Missouri Constitution and the Second and Fourteenth Amendments to the United States Constitution because § 571.070 is an absolute ban on Mr. Merritt's constitutional right to possess a firearm, as guaranteed under Article I, § 23 of the Missouri Constitution and the Second and Fourteenth Amendments to the United States Constitution, and § 571.070 is not narrowly tailored to effectuate any compelling governmental interest.

Griffith v. Kentucky, 479 U.S. 314 (1987);

Bernat v. State, 194 S.W.3d 863 (Mo. banc 2006);

State v. Richard, 298 S.W.3d 529 (Mo. banc 2009);

District of Columbia v. Heller, 554 U.S. 570 (2009);

Mo. Const., Art. I, § 23;

U.S. Const., Amend. II;

U.S. Const., Amend XIV; and

§ 571.070.

POINT RELIED ON - II

In the alternative to Point I, the trial court did not err in dismissing Counts I, II, and III of the felony indictment against Mr. Merritt because the statute under which Mr. Merritt was charged, § 571.070, violates Article I, § 23 of the Missouri Constitution and the Second and Fourteenth Amendments to the United States Constitution in that it is an absolute ban on Mr. Merritt's constitutional right to possess a firearm solely because he is a convicted felon and that restriction is an improper time, place, and manner restriction on Mr. Merritt's constitutional right to bear arms as guaranteed by Article I, § 23 of the Missouri Constitution and the Second and Fourteenth Amendments to the United States Constitution.

City of Jefferson v. Mo. Dept. of Natural Res., 863 S.W.2d 844 (Mo. banc 1993);

State v. Richard, 298 S.W.3d 529 (Mo. banc 2009);

State v. Horne, 622 S.W.2d 956 (Mo. banc 1981);

District of Columbia v. Heller, 554 U.S. 570 (2009);

Mo. Const., Art. I, § 23;

U.S. Const., Amend. II;

U.S. Const., Amend XIV; and

§ 571.070.

POINT RELIED ON - III

To the extent that the Circuit Court's dismissal of Counts I, II and III could have been based on Article I, § 13 of the Missouri Constitution (the ban on retrospective laws), Mr. Merritt concedes the issue raised in Appellant's third point relied on in its amended brief because the ban on retrospective laws contained in Article I, § 13 does not apply to criminal statutes.

State v. Honeycutt, 421 S.W.3d 410 (Mo. banc 2013).

ARGUMENT I

The trial court did not err in dismissing Counts I, II, and III of the felony indictment against Mr. Merritt in that § 571.070, violates Article I, § 23 of the Missouri Constitution and the Second and Fourteenth Amendments to the United States Constitution because § 571.070 is an absolute ban on Mr. Merritt's constitutional right to possess a firearm, as guaranteed under Article I, § 23 of the Missouri Constitution and the Second and Fourteenth Amendments to the United States Constitution, and § 571.070 is not narrowly tailored to effectuate any compelling governmental interest.

Preservation of Error

This point is not preserved for appellate review. On May 22, 2013, Mr. Merritt filed his "motion to dismiss indictment with prejudice as § 571.070 violates the Missouri constitution as applied" (L.F. 15-24). In his motion, Mr. Merritt alleged that the trial court should dismiss the indictment with prejudice because § 571.070 violates Article I, §§ 13 and 23 of the Missouri constitution in that it is unconstitutionally retrospective and because it is an absolute ban on his right to possess a firearm solely because he is a convicted felon, and that ban is not a reasonable time, place, or manner restriction under the police power of the State (L.F. 15).

The State filed its response on July 25, 2013 (L.F. 25-31). The State's response addressed Mr. Merritt's claim that § 571.070 violates Article I, § 13 of the Missouri Constitution, but it did not address Mr. Merritt's claim that § 571.070 violates Article I, § 23 of the Missouri State Constitution (L.F. 25-31).

Under Missouri law, constitutional questions must be raised at the earliest opportunity consistent with good pleading and orderly procedure, the section of the Constitution claimed to have been violated must be specified, the facts showing the violation must be stated, and the point must be preserved throughout the trial and in after trial motions. *Kansas City v. Miller*, 463 S.W.2d 565, 566 (Mo. App. W.D. 1971); *State v. Knight*, 351 S.W.2d 802, 804 (Mo. App. E.D. 1961); *State v. Knifong*, 53 S.W.3d 188, 191-192 (Mo. banc 1975). If a party fails to properly preserve an argument that a statute is constitutionally invalid, the issue cannot be considered on appeal. *State v. Belcher*, 805 S.W.2d 245, 251 (Mo. App. S.D. 1991); *State v. Holley*, 488 S.W.2d 925 (Mo. App. W.D. 1972); *State v. Flynn*, 519 S.W.2d 10, 12-13 (Mo. 1975).

There is nothing in the record to indicate that the state addressed Mr. Merritt's contention that § 571.070 violates Article I, § 23 of the Missouri State Constitution. Thus, the State addresses the issue raised in Point I and Point II of its Amended Appellant's brief for the first time on appeal, having never raised the issue with the trial court.

Standard of Review

On May 7, 2014, the Missouri General Assembly passed the Senate Committee Substitute for Senate Joint Resolution 36. *Dotson v. Kander*, 435 S.W.3d 643, 644 (Mo. 2014). Senate Joint Resolution 36, otherwise known as Amendment 5, sought to amend Article I, § 23 of the Missouri Constitution. Previously, Article I, § 23 of the Missouri Constitution read as follows:

> That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons.

Mo. Const. Art. I, § 23 (1945).

The governor called for a special election and the election was held on August 5, 2014. *Id*. at 644. The resolution passed by a margin of 60.946%, effectively amending Article I, § 23 of the Missouri Constitution. Election Results, Secretary of State's website, http://enrarchives.sos.mo.gov/enrnet/default.aspx?eid=750002907. The amendment took effect on September 4, 2014, while the appeal in the present case was still pending. Mo. Const. Art. XII, § 2(b). The amendment changed Art. I, § 23 of the Missouri Constitution to read as follows:

> That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the formal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable. Any restriction on these right shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of

> convicted violent felons or those adjudicated by a court to be a danger to self or others as a result of a mental disorder or mental infirmity.

Mo. Const. Art. I, § 23 (amended 2014).

A right to bear arms clearly existed under the Missouri Constitution prior to the recent amendment. *See* Mo. Const. Art. I, § 23 (1945). Thus, the recent amendment to this provision did not create a new substantive right. Instead, it further defined an already existing right and specifically "changed" the standard of review for all Missouri gun regulations to strict scrutiny.[2] *See* Mo. Const. Art. I, § 23 (Amended 2014); *See also State v. Richard*, 298 S.W.3d 529 (Mo. banc 2009).

Because the amendment was procedural, and not substantive, the new procedural rule should apply prospectively to all cases arising after the effective date of the amendment (i.e. September 5, 2014) and should be applied retroactively to any case that was pending on direct review or was otherwise not yet final as of the effective date of the amendment. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Thus, the recent amendment should be applied to the present case, since it is still pending on direct review.[3] As far as other cases beyond direct appeal, this Court could nevertheless choose

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[2] It is unclear exactly what the standard would have been previously, although This Court had used intermediate Scrutiny after the *District of Columbia v. Heller* decision. *See State v. Richard*, 298 S.W.3d 529 (Mo. banc 2009).

[3] The Appellant appears to concede and advocate this position in Point One of its amended appellant's brief (Appellant's Brief, Page 21).

to apply the recent amendment to other cases on collateral review since, "*Griffith* did not set a limit, or ceiling, on when new procedural rules will be applied to other cases, but rather a floor." *See State v. Whitfield*, 107 S.W.3d 253, 263 (Mo. banc 2003).

In Point II pf Appellant's amended brief, the Appellant suggests, in the alternative to point I, that the recent amendment to Article I, § 23 of the Missouri Constitution should not be applied to the present case. (See Appellant's Amended Brief, Pages 32-34). The Appellant's reliance on *State ex rel. Hall v. Vaughn* in its alternative Point II in Appellant's Amended Brief is misplaced. 483 S.W.2d 396 (Mo. banc 1972). First, to the extent that *Hall* contradicts the "floor" set by *Griffith*, it is no longer good law. Secondly, the *Hall* court dealt with an entirely new constitutional provision; not an amendment to an already existing constitutional provision. *Id.* at 398-399. In fact, the *Hall* court did not apply the prospective test used in that case until it determined that it was dealing with an entirely new constitutional provision. *Id*. at 398-399. The *Hall* Court found as follows:

> Section 30 is an entirely new provision applicable to all court plan judges, including circuit court judges, and as such, must be considered as an expression of a new constitutional policy. Therefore, if we are to follow the law of this state, prospective application is to be given the new amendment in question, unless we can find a contrary intent that is spelled out in clear, explicit and unequivocal detail so that retrospective application is called for beyond (a) reasonable question.

Id. at 398-399 (internal citations omitted). Here, as the Appellant concedes, because the recent amendment merely modified an already existing constitutional provision and did not create an entirely new constitutional provision the rule utilized in *Hall* would be inappropriate to apply in the present case. *Id.* Thus, the appropriate standard of review in this case would be strict scrutiny.

To pass strict scrutiny review, a governmental intrusion must be justified by a "compelling state interest" and must be narrowly drawn to express the compelling state interest at stake. *Bernat v. State*, 194 S.W.3d 863, 868 (Mo. banc 2006). When considering the legal issue of the constitutional validity of a statute, this question of law is to be reviewed *de novo*. *City of Arnold v. Tourkakis*, 249 S.W.3d 204 (Mo. banc 2008). "A statute is presumed to be constitutional and will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" *Board of Educ. Of City of St. Louis v. State*, 47 S.W.3d 366, 368-369 (Mo. banc 2001) (citing *Linton v. Mo. Veterinary Medical Bd.*, 988 S.W.2d 513, 515 (Mo. banc 1999); *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. banc 1992). Further, "it should be obvious that a statute cannot supersede a constitutional provision." *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 341 (Mo. banc 1993). Neither the language of the statute nor judicial interpretation thereof can abrogate a constitutional right. *State v. Bolin*, 643 S.W.2d 806, 810 (Mo. banc 1983); *see also State ex rel. Liberty Sch. Dist. v. Holden*, 121 S.W.3d 232, 234 n. 6 (Mo. banc 2003).

Analysis

The state does not have a compelling government interest in banning *all* convicted felons under *all* circumstances from possessing firearms *for life*, protecting the public safety, and reducing the incidence of violent and firearm-related criminal activity. Going beyond a time, place, and manner regulation to a complete lifetime ban under all circumstances fails the strict scrutiny test because § 571.070 is not narrowly drawn to express any compelling state interest. Thus, this Court should affirm the trial court's dismissal of Counts I, II, and III.

As amended, Article I, § 23 of the Missouri Constitution provides:

> That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the formal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable. Any restriction on these right shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as a result of a mental disorder or mental infirmity.

Mo. Const. Art. I, § 23 (amended 2014). Unless otherwise defined in the text, words used in the constitution are given their plain and ordinary meaning. *City of Jefferson v. Mo. Dept. of Natural Res.*, 863 S.W.2d 844, 850 (Mo. banc 1993). The United States

Constitution also protects an individual's right to bear arms in the Second Amendment. The Second Amendment provides:

> "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

U.S. Const. Amend. II.

"Provisions of our state constitution may be construed to provide more expansive protections than comparable federal constitutional provisions." *State v. Rushing*, 935 S.W.2d 30, 34 (Mo. banc 1996). However, analysis of a section of the federal constitution is "strongly persuasive in construing the like section of our State constitution." *Id*. (declining to expand Article. I, § 15, "beyond that provided by the Fourth Amendment"). Further, the United States Supreme Court has decisively held that incorporated Bill of Rights protections "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Mallory v. Hogan*, 378 U.S. 1, 10-11 (1964). Thus, although states may provide *more* expansive protection of individual rights against state encroachment under state constitutional law, each state must, at a minimum, provide the same standard of protection against state encroachment on individual rights as is provided under federal constitutional law. *Id.*

The current version of § 571.070 directly violates the plain and ordinary meaning of Article I, § 23 of the Missouri Constitution, which states that a person's right to keep and bear arms, ammunition, and accessories typical to the formal function of such arms,

in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. Mo. Const., Article. I, § 23.

In *District of Columbia v. Heller*, the United States Supreme Court held that the second amendment guarantees the individual right to possess and carry weapons "in case of confrontation." 554 U.S. 570, 592 (2008). In *Heller*, the United States Supreme Court further found that the history of the second amendment right to bear arms included an inherent right of self-defense, particularly of one's home, where the need for defense of self, family, and property is most acute. *Id.* at 628. In *McDonald v. City of Chicago, Ill.*, the United States Supreme Court further held that the Second Amendment is applicable to the States via the Fourteenth Amendment. 130 S.Ct 3020, 3050 (2010). The *McDonald* Court noted that, "In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States." *Id.* Thus, under plain language of both Article I, § 23 and under the Second Amendment to the United States Constitution, the people enjoy a fundamental and "unalienable" right to keep and bear arms, ammunition, and accessories typical to the formal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power. Thus, the current version of § 571.070 would violate the United States Supreme Court decisions in *Heller* and *McDonald* because the statute has no exception for the inherent right of self-defense or defense of others.

In *State v. Richard*, this Court held that possession of a loaded firearm by an intoxicated individual poses a reasonable threat to public safety and thus, § 571.030.1(5) represented "a reasonable exercise of the legislative prerogative to preserve the public safety by regulating the possession of firearms by intoxicated individuals." 298 S.W.3d 529, 530-531 (Mo. banc 2009). Despite the danger to the public, § 571.030.1(5) contains an exception for instances in which intoxicated persons possess firearms for purposes of self-defense. Unlike § 571.030.1(5), § 571.070 has no specific exception where the defendant can possess a firearm in the defense of himself or another. *Richard*, 298 S.W.3d at 532-533. Without such a provision, the statute exceeds the limits provided by the Missouri Constitution and the United States Constitution and is not narrowly expressed to achieve the state's compelling interest.

The State asserts that its compelling interest is supported by studies that show that previous convictions, including convictions for non-violent, property crimes, are correlated with future crime. (Appellant's Amended Brief, Page 23). However, none of the studies cited by Appellant support the conclusion that there is any causal relationship between banning *all* convicted felons under *all* circumstances from possessing firearms *for life* and protecting the public safety and in reducing the incidence of violent and firearm-related criminal activity. First, findings of the studies cited by the Appellant do not apply to the State of Missouri. If § 570.070 aided the State's compelling interest of protecting the public safety and reducing the incidence of violent gun-related crime, one would expect a decrease in the violent crime rate in Missouri from 2008 (i.e. the year § 570.070 was amended) to the present. To the contrary, Appellant suggests that the

violent crime rate in the State of Missouri has actually increased since 2011. (Appellant's Amended Brief, page 24-25). Thus, there appears to be a positive correlation between the violent crime rate in Missouri and § 571.070. This could be construed to suggest that the current, more restrictive version of § 571.070 has *caused* an increase in the violent crime rate. Nevertheless, it certainly does demonstrate that a complete and lifetime ban on felons possessing any kind of firearm, for any reason, has no real effect on the violent crime rate or the State's compelling interest in protecting public safety and does not reduce the incidence of violent and firearm-related criminal activity.

Further, the felon in possession laws, at the federal level and in other states, demonstrate that § 571.070 is not "narrowly drawn to accomplish the compelling state interest at stake." According to Senator Shaefer, the recent amendment to Article I, § 23 of the Missouri Constitution was designed to bring Missouri's Constitution "in line" with federal second amendment law. (Brief of Amicus Curiae Senator Schaefer, Page 2-3). Although, the Missouri Legislature may have brought Article I, § 23 of the Missouri Constitution in line with federal law, § 571.070 is not in line with the federal felon in possession statute.

In Missouri, the unlawful possession of a firearm statute, § 571.070, states in relevant part:

> A person commits the crime of unlawful possession of a firearm if such person knowingly has any firearm in his or her possession and . . . [s]uch person has been convicted of a felony under the laws of this state, or of a crime under the laws of

> any state or of the United States which, if committed in this state, would be a felony.

§ 571.070.1(1).

Thus, the current version of the statute under which Mr. Merritt was charged, bans an entire class of people, convicted felons, from possessing firearms *for any reason for life*. In contrast, under 18 U.S.C. § 922(g), felons may not "possess . . . any firearm or ammunition; or . . . receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. 18 U.S.C. § 922(g) (2006). The federal law prohibits "any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year," although certain exceptions narrow this definition. 18 U.S.C. § 922(g) (2006).

For example, persons charged with federal or state crimes "pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices" are not included. 18 U.S.C. § 921(a)(20)(A). Additionally, the definition does not include those convicted of crimes punishable by imprisonment of two years or less if the offense is considered a misdemeanor. 18. U.S.C. § 921(a)(20(B). Thus, unlike Missouri's § 571.070, the federal felon in possession statute does not limit all felons from possessing all kinds of firearm. Thus, federal law regulating felons possessing firearms is more narrowly drawn than § 570.070. This disparity leads to some nonsensical outcomes. For instance, a person convicted of a federal anti-trust felony is permitted to possess a firearm under federal law but not under Missouri law. This kind of disparity is particularly dangerous, since it increases the

likelihood that certain felons would inadvertently violate either state or federal law because of confusion about the differences between the statutes. Following the federal government's lead at the state level would require re-writing § 570.070 to exclude a number of felonies that do not involve violence.

Prior to 2008, § 571.070 was more similar to the federal felon in possession law than the current version of § 571.070. *See* § 571.070, L. 2008, H.B. No. 2034, § A. The previous version of § 571.070 limited dispossession of "concealable firearms" to those felons convicted of committing or attempting to commit a "dangerous felony", as defined by § 556.061. "Concealable firearms" were defined by § 571.010 as, "any firearm with a barrel less than sixteen inches in length, measured from the face of the bolt or standing breech." § 571.010(4), RSMo. Cum. Supp. 2007. § 556.061 defined a dangerous felony as:

> the felonies of arson in the first degree, assault in the first degree, attempted forcible rape if physical injury results, attempted forcible sodomy if physical injury results, forcible rape, forcible sodomy, kidnapping, murder in the second degree, assault of a law enforcement officer in the first degree, domestic assault in the first degree, elder abuse in the first degree, robbery in the first degree, statutory rape in the first degree when the victim is a child less than twelve years of age at the time of the commission of the act giving rise to the offense, statutory sodomy in the first degree when the victim is a child less than twelve years of age at the time of the commission of the act giving rise to the offense, and abuse of a child

pursuant to subdivision (2) of subsection 3 of § 568.060, RSMo., and child kidnapping.

§ 556.061(8), RSMo. Cum. Supp. 2007.

Further, the prohibition against felons possessing such firearms had a time limitation only five years after conviction or release from confinement. *See* § 571.070, L. 2008, H.B. No. 2034, § A. Such a limited restriction, like the federal statute, could have been considered narrowly drawn to accomplish the compelling government interest. It prevented dangerous convicted felons convicted from possessing certain firearms, specifically concealable firearms, for a five-year period after conviction or release from confinement. Such a restriction may been narrowly drawn to balance the individual's right to possess a firearm, albeit a "non-concealable" firearm, for the purpose of self-defense or the defense of others.[4] Nevertheless, there is no such protection under the current version of § 571.070 at issue here, and thus the statute is not narrowly expressed and does not pass strict scrutiny.

The current version of § 571.070 is also not narrowly expressed in that § 571.070 offers no procedure for convicted felons to have their right to bear arms restored as other similar statutes prohibiting the possession of firearms by felons in other states do. In

[4] In January 2012, a bill (HB 1482) was introduced in the Missouri legislature that would have created an exception to the unlawful possession law for those in possession of a rifle or shotgun who were not convicted of a "violent felony" (i.e. one that involved a weapon, use of force, or arson). To date, the bill has not been passed.

footnote 4, this Court noted in *Richard* that four other states (Colorado, Mississippi, Montana, and Oklahoma) have a constitutional provision nearly identical to Article I, § 23 of the Missouri Constitution, and like Missouri, each of those states expressly recognized that the right to keep and bear arms can be regulated pursuant to the state's inherent police power. *Richard*, 298 S.W.3d at 532, n. 4. Nevertheless, it is difficult to compare Missouri's § 571.070 with other jurisdictions because of the fundamental differences between each jurisdictions' statutes and the existence of a procedure in other states to have the right to bear arms restored.

A majority of states have laws that explicitly allow felons to restore their right to bear arms. The most common means is application or petition to a state court or another state authority. *See* Conn. Gen. Stat. § 45a-100; N.Y. Correction Law § 702 (McKinney); Wash. Rev. Code § 9.41.040; Ariz. Rev. Stat. Ann. § 13-905; Ind. Code § 35-47-4-7; Miss. Code Ann. § 97-37-5; N.D. Cent. Code § 62.1-02-01.1; Ohio Rev. Code Ann. § 2923.14 (West); Or. Rev. Stat. § 166.274; 18 Pa. Cons. Stat. § 6105; W. Va. Code § 61-7-7; N.C. Gen. Stat. § 14-415.4; Tenn. Code Ann. § 40-29-101 (circuit court may restore full rights of citizenship, except handguns per *State v. Johnson*, 79 S.W.3d 522 (Tenn. 2002)); 430 Ill. Comp. Stat. 65/10 (certain felons may "appeal to the Director of State Police for a hearing upon . . . denial" of Firearm Owner's Identification Card); Ark. Code Ann. § 5-73-103 ("The Governor may restore without granting a pardon the right of a convicted felon . . . to own and possess a firearm . . . ."); Me. Rev. Stat. tit. 15, § 393 (application to the Commissioner of Public Safety); Mich. Comp. Laws § 28.424 (application to the concealed weapons licensing board); Ga. Code Ann. § 16-11-131

(application to Board of Public Safety upon receiving relief from the federal government).

Many of these states have imposed specific limitations on whose rights can be restored. New York, for example, will only issue a certificate of relief from disability to eligible felons. N.Y. Correction Law § 702 (McKinney). New York defines an eligible felon as "a person who has been convicted of a crime or of an offense, but who has not been convicted more than once of a felony." N.Y. Correction Law § 700 (McKinney).

A few states restore felons' rights automatically upon release, depending on the crime. Montana, for example, states in its constitution that "Full rights are restored by termination of state supervision for any offense against the state." Mont. Const. art. 2, § 28. However, Montana imposes a statutory exception for crimes committed with a dangerous weapon. Mont. Code Ann. § 45-8-313. Under such circumstances, felons may nevertheless apply to their district court for a permit to possess firearms. Mont. Code Ann. § 45-8-314; *see also* Minn. Stat. § 609.165 (right of firearm possession automatically restored unless crime was one of violence and the order of discharge specifies prohibition, in which case felons must petition the court to have their rights restored); Idaho Code Ann. § 18-310 (right of firearm possession automatically restored except for treason and thirty-six enumerated offenses, in which case the felon may apply to the commission of pardons and parole).

More commonly, states restore rights automatically after a set amount of time. Louisiana, for instance, only applies firearm restrictions to those convicted of specific crimes, but the restriction ends ten years after completion of the punishment. La. Rev.

Stat. Ann. § 14:95.1; *see also* N.M. Stat. Ann. § 30-7-16 (felon definition does not include those whose sentences have been completed ten years or more ago); S.D. Codified Laws § 22-14-15 (varying lengths of time for restoration of firearm rights for violent crimes, possession of controlled substance, and domestic violence misdemeanors); R.I. Gen. Laws § 11-47-5 (right reinstated two years following conviction for domestic violence felony); Tex. Penal Code Ann. § 46.04 (firearm rights restored five years after release, but only permitted in a felon's own home); Alaska Stat. § 11.61.200 (only prohibits possession of firearms that can be concealed on one's person; prohibition expires ten years after completion of sentence); N.D. Cent. Code § 62.1-02-01 (rights restored ten years after release, if not restored through petition to the court prior).

Some states restrict restoration of felons' rights based on the nature of the crime. Arizona, for instance, permits felons convicted of serious offenses to apply to have their rights restored ten years after the end of their sentences. Ariz. Rev. Stat. Ann. § 13-905; *see* Ariz. Rev. Stat. Ann. § 13-706 for definition of serious offenses. Those convicted of dangerous offenses, however, are permanently prohibited from applying to have their rights restored. Ariz. Rev. Stat. Ann. § 13-905; *see* Ariz. Rev. Stat. Ann. § 13-704 for definition of dangerous offenses. *See also* Iowa Code § 914.7 (only those convicted of forcible felonies, felony controlled substance violations involving firearms, or felony weapons violations may not have their rights restored).

It is likewise common for states to determine if felons' rights will be restricted in the first place based on the nature of the crime. *See*; S.C. Code Ann. § 16-23-500 (only prohibiting possession by felons convicted of a violent offense); Wyo. Stat. Ann. § 6-8-

102 (only prohibiting possession by felons convicted of a violent offense or interfering with or disarming a peace officer); Tenn. Code Ann. § 39-17-1307 (unlawful for felons convicted of crimes involving the use of force, violence, or a deadly weapon or felony drug offenses to possess firearms, except handguns which are illegal for all felons); N.D. Cent. Code § 62.1-02-01 (prohibiting only felons convicted of a crime involving violence or intimidation from possessing firearms).

Laws that lack a way to restore the right to bear arms have been challenged and struck down. A previous version of North Carolina's statute prohibiting firearm possession by felons did not allow for restoration of a felon's right to bear arms. N.C. Gen. Stat. § 14-415.1 (2009). This law came before the Supreme Court of North Carolina in *Britt v. State*, 681 S.E.2d 320 (N.C. 2009). The *Britt* court determined that the statute was in violation of North Carolina's constitution as applied to the plaintiff. *Britt*, 681 S.E.2d at 323. The court reasoned that it unduly restrained the plaintiff's constitutional right to bear arms. *Id.*; *see also Baysden v. State*, 718 S.E.2d 699 (N.C. Ct. App. 2011); *Wesson v. Town of Salisbury*, No. 13-10469-RGS, 2014 U.S. Dist. Lexis 54441 (D. Mass. 2014) (the portion of a Massachusetts law prohibiting gun possession by those who had violated any law regulating controlled substances was found to be an unconstitutional infringement on the Second Amendment right to bear arms). North Carolina's legislature enacted an amendment to the law the next year providing a means for felons to restore their firearm rights. 2010 N.C. Sess. Laws 108.

In addition to a majority of states, the federal government also allows felons' firearm rights to be restored. The federal government allows felons to apply to the

Attorney General for relief from disability of firearm rights. 18 U.S.C § 925. If the Attorney General denies the application, petition may be made to the district court for review. *Id*. In states like Kentucky, felons who have been granted relief from their firearm disabilities by the federal government are also granted relief by the state. Ky. Rev. Stat. Ann. § 527.040; *see also* Wis. Stat. § 941.29; Miss. Code Ann. § 97-37-5. Missouri has a similar procedure for those adjudged to be incompetent to restore their right to possess a firearm. Normally, under § 571.070.1(2), those adjudged to be incompetent may not possess a firearm and if they do, they are subject to the same criminal sanctions as felons. However, under § 571.092.1, a person who is subject to the firearms-related disabilities under federal law as a result of an adjudication or commitment that occurred in this state may file a petition in Circuit Court for the removal of the disqualification to ship, transport, receive, purchase, possess, or transfer a firearm under federal law and Missouri law. Thus, under Missouri law, the mentally incompetent may have their gun rights restored and intoxicated persons may possess a firearm for purposes of self-defense, even while intoxicated, but felons cannot possess a firearm for any reason for the remainder of their lives.

Other fundamental rights *are* eventually restored to felons under Missouri law. For instance, under Missouri law a convicted felon's right to vote is *automatically* restored once they are no longer confined under a sentence of imprisonment or once they have completed probation or parole, unless they are convicted for a felony involving the right of suffrage, in which case the felon is barred from voting indefinitely. §§ 115.133.2(1), (2), and (3); § 561.026. Additionally, a convicted felon may hold public

office after the completion of his or her sentence or probation, unless the felony is connected to the right of suffrage, which disqualifies him or her from holding any elected or appointive office indefinitely. §§ 561.021(1)(1), (2).[5] Further, no State agency may deny a license to a felon on the basis of his conviction, although a felony conviction may be considered as a factor in the decision-making process. § 314.200. Thus, most convicted felons could go to law school, be licensed to practice law in the State of Missouri, and run for and win a Senate seat in the Missouri Legislature by one vote (i.e. their own vote), but they cannot possess a firearm for any reason. In Point II of Appellant's Amended Brief, the State suggests that felons are not permitted to possess firearms because felons are "lawless" and cannot be "entrusted with dangerous instrumentalities." (Appellant's Amended Brief, Page 37, citing *State v. Brown*, 571 A.2d 816, 821 (Me. 1990) and *People v. Blue*, 544 P.2d 385, 391 (Co. 1975). If Missouri followed this policy, then why would the State of Missouri allow some felons to vote, hold professional licenses, and hold public office?

Missouri's prohibition on felons' ability to possess firearms is out of step with the national standard, which is unfortunate, because since the mid-1990s, crime has declined in the United States. *See* Federal Bureau of Investigation, *Crime in the United States, by Volume and Rate per 100,000 Inhabitants, 1994-2013*, Table 1 (2013), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-

[5] With the exception of the office of sheriff, which no felon may hold. § 57.010.

2013/tables/1tabledatadecoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1994-2013.xls#overview.

Its lack of opportunity for felons to restore their rights and the excessive breadth of its restriction are contrary to Article I, Section 23 of Missouri's Constitution and the Second Amendment to the United States Constitution. Laws prohibiting firearm possession by felons are often specific to only a certain class of offenders, such as those convicted of violent crimes. Further, the majority of states and the federal government permit felons to restore their basic right to bear arms in some way; whether through application to the court, application to another state agency, or simply by passage of time. Missouri law does provide two avenues for restoration of rights for felons: gubernatorial pardon and expungement for *some* state felony convictions, as suggested by the State's original brief and amended brief (Appellant's brief, page 21-22, Appellant's Amended Brief, Page 43). Nevertheless, neither a gubernatorial pardon nor expungement is available to Mr. Merritt in this case since the alleged underlying criminal conviction was from a foreign jurisdiction (i.e. a federal conviction) and no Missouri authority has the power to grant pardons or expunge a federal conviction (L.F. 13-14). No doubt, a large percentage of other felons are subject to the same lifetime ban on the possession of any kind of firearm for any purpose in Missouri based on the current version of § 571.070.

The state presents no credible evidence to suggest that all felons, from the moment of their conviction to death, pose a greater risk to the public health, safety, morals or welfare than intoxicated persons charged under § 571.030 or the mentally ill charged under § 571.070. Nor has the state presented any credible evidence that a convicted felon

could not be entrusted with the possession of a firearm for the purpose of self-defense any more or less than an intoxicated individual charged under § 571.030.

§ 571.070 creates a complete lifetime ban on the possession of firearms based on a felon's past actions, whether violent or non-violent, whereas § 571.030.1(5) temporarily criminalizes the possession of firearms by intoxicated individuals based on the assumption that they are, at the time of possession, a danger to the public health, safety, morals or welfare because they present an acute and immediate risk that the firearm may be discharged in a careless or imprudent manner. It cannot honestly be stated that such a risk exists when a felon who was convicted of a non-violent offense possesses a firearm for the specific purpose of self-defense. In such a case, there is not even a history suggesting the careless or imprudent discharge of such a firearm under such circumstances, let alone an acute and immediate risk to the public health, safety, morals or welfare.

Perhaps Judge Fischer stated it best in his concurring opinion in *Richard*,

> Like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for any purpose whatsoever. *Heller*, 128 S. Ct. at 2786. The United States Supreme Court has noted *reasonable* limitations on the possession of firearms by felons and the mentally ill and laws forbidding the carrying of firearms in sensitive places, such as schools and government buildings. *Id*.

Richard, 298 S.W.3d 529, 534 (Mo. banc 2009) (J. Fischer, concurring opinion)(emphasis added).

Just as an individual's right under the Second and Fourteenth Amendments to the United States Constitution and Article I, § 23 should not be a right to keep and carry any weapon whatsoever in any manner whatsoever for any purpose whatsoever, the restriction against convicted felons carrying firearms should not be so complete as to restrict all felons from carrying a firearm for any purpose, whatsoever, for life. The restriction in § 571.070 is not narrowly drawn to accomplish the compelling government interest at stake and unjustifiably invades rights secured by Art. I, § 23 of the Missouri Constitution and under the Second and Fourteenth Amendments to the United States Constitution.

ARGUMENT - II

In the alternative to Point I, the trial court did not err in dismissing Counts I, II, and III of the felony indictment against Mr. Merritt because the statute under which Mr. Merritt was charged, § 571.070, violates Article I, § 23 of the Missouri Constitution and the Second and Fourteenth Amendments to the United States Constitution in that it is an absolute ban on Mr. Merritt's constitutional right to possess a firearm solely because he is a convicted felon and that restriction is an improper time, place, and manner restriction on Mr. Merritt's constitutional right to bear arms as guaranteed by Article I, § 23 of the Missouri Constitution and the Second and Fourteenth Amendments to the United States Constitution.

Preservation of Error

This point is not preserved for appellate review. On May 22, 2013, Mr. Merritt filed his "motion to dismiss indictment with prejudice as § 571.070 violates the Missouri constitution as applied" (L.F. 15-24). In his motion, Mr. Merritt alleged that the trial court should dismiss the indictment with prejudice because § 571.070 violates Article I, §§ 13 and 23 of the Missouri constitution in that it is unconstitutionally retrospective and because it is an absolute ban on his right to possess a firearm solely because he is a convicted felon, and that ban is not a reasonable time, place, or manner restriction under the police power of the State (L.F. 15).

The State filed its response on July 25, 2013 (L.F. 25-31). The State's response addressed Mr. Merritt's claim that § 571.070 violates Article I, § 13 of the Missouri

Constitution, but it did not address Mr. Merritt's claim that § 571.070 violates Article I, § 23 of the Missouri State Constitution (L.F. 25-31).

Under Missouri law, constitutional questions must be raised at the earliest opportunity consistent with good pleading and orderly procedure, the section of the Constitution claimed to have been violated must be specified, the facts showing the violation must be stated, and the point must be preserved throughout the trial and in after trial motions. *Kansas City v. Miller*, 463 S.W.2d 565, 566 (Mo. App. W.D. 1971); *State v. Knight*, 351 S.W.2d 802, 804 (Mo. App. E.D. 1961); *State v. Knifong*, 53 S.W.3d 188, 191-192 (Mo. banc 1975). If a party fails to properly preserve an argument that a statute is constitutionally invalid, the issue cannot be considered on appeal. *State v. Belcher*, 805 S.W.2d 245, 251 (Mo. App. S.D. 1991); *State v. Holley*, 488 S.W.2d 925 (Mo. App. W.D. 1972); *State v. Flynn*, 519 S.W.2d 10, 12-13 (Mo. 1975).

There is nothing in the record to indicate that the state addressed Mr. Merritt's contention that § 571.070 violates Article I, § 23 of the Missouri State Constitution. Thus, the state addresses the issue raised in Point II of Appellant's brief for the first time on appeal, having never raised the issue with the trial court.

Standard of Review

On May 7, 2014, the Missouri General Assembly passed the Senate Committee Substitute for Senate Joint Resolution 36. *Dotson v. Kander*, 435 S.W.3d 643, 644 (Mo. 2014). Senate Joint Resolution 36, otherwise known as Amendment 5, sought to amend Article I, § 23 of the Missouri Constitution. Previously, Article I, § 23 of the Missouri Constitution read as follows:

> That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons.

Mo. Const. Art. I, § 23 (1945).

The governor called for a special election and the election was held on August 5, 2014. *Id*. at 644. The resolution passed by a margin of 60.946%, effectively amending Article I, § 23 of the Missouri Constitution. Election Results, Secretary of State's website, http://enrarchives.sos.mo.gov/enrnet/default.aspx?eid=750002907. The amendment took effect on September 4, 2014, while the appeal in the present case was still pending. Mo. Const. Art. XII, § 2(b). The amendment changed Art. I, § 23 of the Missouri Constitution to read as follows:

> That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the formal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable. Any restriction on these right shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of

> convicted violent felons or those adjudicated by a court to be a danger to self or others as a result of a mental disorder or mental infirmity.

Mo. Const. Art. I, § 23 (amended 2014).

A right to bear arms clearly existed under the Missouri Constitution prior to the recent amendment. *See* Mo. Const. Art. I, § 23 (1945). Thus, the recent amendment to this provision did not create a new substantive right. Instead, it further defined an already existing right and specifically "changed" the standard of review for all Missouri gun regulations from intermediate scrutiny to strict scrutiny. *See* Mo. Const. Art. I, § 23 (Amended 2014); *See also State v. Richard*, 298 S.W.3d 529 (Mo. banc 2009).

Because the amendment was procedural, and not substantive, the new procedural rule should apply prospectively to all cases arising after the effective date of the amendment (i.e. September 5, 2014) and should be applied retroactively to any case that was pending on direct review or was otherwise not yet final as of the effective date of the amendment. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Thus, the recent amendment should be applied to the present case, since it is still pending on direct review.[6] Nevertheless, this Court could still choose to apply the recent amendment to other cases on collateral review since, "*Griffith* did not set a limit, or ceiling, on when new procedural rules will be applied to other cases, but rather a floor." *See State v. Whitfield*, 107 S.W.3d 253, 263 (Mo. banc 2003).

[6] The Appellant appears to concede and advocate this position in Point One of its amended appellant's brief (Appellant's Brief, Page 21).

The Appellant's reliance on *State ex rel. Hall v. Vaughn* in its alternative Point II in Appellant's Amended Brief is misplaced. 483 S.W.2d 396 (Mo. banc 1972). First, to the extent that *Hall* contradicts the "floor" set by *Griffith*, it is no longer good law. Secondly, the *Hall* court dealt with an entirely new constitutional provision; not an amendment to an already existing constitutional provision. *Id.* at 398-399. In fact, the *Hall* court did not apply the prospective test used in that case until it determined that it was dealing with an entirely new constitutional provision. *Id.* at 398-399. The *Hall* Court found as follows:

> Section 30 is an entirely new provision applicable to all court plan judges, including circuit court judges, and as such, must be considered as an expression of a new constitutional policy. Therefore, if we are to follow the law of this state, prospective application is to be given the new amendment in question, unless we can find a contrary intent that is spelled out in clear, explicit and unequivocal detail so that retrospective application is called for beyond (a) reasonable question.

Id. at 398-399 (internal citations omitted). Here, as the Appellant concedes, because the recent amendment merely modified an already existing constitutional provision and did not create an entirely new constitutional provision the rule utilized in *Hall* would be inappropriate to apply in the present case. *Id.* Thus, the appropriate standard of review in this case would be strict scrutiny.

However, should this Court choose not to apply strict scrutiny, the appropriate standard of review appears to be intermediate scrutiny. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Richard*, 298 S.W.3d 529, 530-531 (Mo. banc 2009).

When considering the legal issue of the constitutional validity of a statute, this question of law is to be reviewed *de novo*. *City of Arnold v. Tourkakis*, 249 S.W.3d 204 (Mo. banc 2008). "A statute is presumed to be constitutional and will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" *Board of Educ. Of City of St. Louis v. State*, 47 S.W.3d 366, 368-369 (Mo. banc 2001) (citing *Linton v. Mo. Veterinary Medical Bd.*, 988 S.W.2d 513, 515 (Mo. banc 1999); *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. banc 1992). Further, "it should be obvious that a statute cannot supersede a constitutional provision." *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 341 (Mo. banc 1993). Neither the language of the statute nor judicial interpretation thereof can abrogate a constitutional right. *State v. Bolin*, 643 S.W.2d 806, 810 (Mo. banc 1983); *see also State ex rel. Liberty Sch. Dist. v. Holden*, 121 S.W.3d 232, 234 n. 6 (Mo. banc 2003).

Analysis

"It is the function of the courts to determine whether a statute purporting to constitute an exercise of the police power has a real and substantial relationship to the protection of the public health, safety, morals, or welfare and whether it unjustifiably invades rights secured by the Constitution." *State ex rel. Kansas City, Mo. v. Public Serv. Comm. of Mo.*, 524 S.W.2d 855, 862 (Mo. banc 1975). Under a federal

constitutional analysis, a law survives "intermediate scrutiny" if it is "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Here, there is no substantial relationship between banning *all* convicted felons under *all* circumstances from possessing firearms *for life* and protecting the public health, safety, morals or welfare. Going beyond a time, place, and manner restriction to a complete lifetime ban under all circumstances fails this test. Thus, this Court should affirm the trial court's dismissal of Counts I, II, and III.

Article I, § 23 of the Missouri Constitution provides, "That the right of every citizen to keep and bear arms . . . shall not be questioned; but this shall not justify the wearing of concealed weapons." Unless otherwise defined in the text, words used in the constitution are given their plain and ordinary meaning. *City of Jefferson v. Mo. Dept. of Natural Res.*, 863 S.W.2d 844, 850 (Mo. banc 1993). The United States Constitution also protects an individual's right to bear arms in the Second Amendment. The Second Amendment provides:

> "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

U.S. Const. Amend. II.

While "provisions of our state constitution may be construed to provide more expansive protections than comparable federal constitutional provisions," *State v. Rushing*, 935 S.W.2d 30, 34 (Mo. banc 1996), analysis of a section of the federal constitution is "strongly persuasive in construing the like section of our State constitution." *Id*. (declining to expand Article. I, § 15, "beyond that provided by the

Fourth Amendment"). Further, the United States Supreme Court has decisively held that incorporated Bill of Rights protections "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Mallory v. Hogan*, 378 U.S. 1, 10-11 (1964). Thus, although states may provide *more* expansive protection of individual rights against state encroachment under state constitutional law, each state must, at a minimum, provide the same standard of protection against state encroachment on individual rights as is provided under federal constitutional law.

In *District of Columbia v. Heller*, the United States Supreme Court held that the second amendment guarantees the individual right to possess and carry weapons "in case of confrontation." 554 U.S. 570, 592 (2008). In *Heller*, the United States Supreme Court further found that the history of the second amendment right to bear arms included an inherent right of self-defense, particularly of one's home, where the need for defense of self, family, and property is most acute. *Id.* at 628. In *McDonald v. City of Chicago, Ill.*, the United States Supreme Court further held that the Second Amendment is applicable to the States via the Fourteenth Amendment. 130 S.Ct 3020, 3050 (2010). The *McDonald* Court noted that, "In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States." *Id.*

In Missouri, the unlawful possession of a firearm statute, § 571.070, states in relevant part:

> A person commits the crime of unlawful possession of a firearm if such person knowingly has any firearm in his or her possession and . . . [s]uch person has been convicted of a felony under the laws of this state, or of a crime under the laws of any state or of the United States which, if committed in this state, would be a felony.

§ 571.070.1(1).

Thus, the current version of the statute under which Mr. Merritt was charged, bans an entire class of people, convicted felons, from possessing firearms *under any circumstance for life*. This directly violates the plain and ordinary meaning of Article I, § 23 of the Missouri Constitution, which limits only carrying concealed weapons. Mo. Const., Article. I, § 23. Further, the current version of § 571.070 would also violate the United States Supreme Court decisions in *Heller* and *McDonald* in that the statute has no exception for the inherent right of self-defense or defense of others. Without such a provision, the exercise of the police power exceeds the limits provided by the Missouri Constitution and the United States Constitution.

In *State v. Richard*, this Court addressed a challenge to the constitutionality of § 571.030.1(5), RSMo. Cum. Supp. 2008, under Article I, § 23 as that statute applied to the possession or discharging of firearms by persons who were intoxicated. 298 S.W.3d 529, 530-531 (Mo. banc 2009). In *Richard*, this Court recognized the "state constitutional right to keep and bear arms, like the Second Amendment, is not absolute. *Id*. The State

has the inherent power to regulate the carrying of firearms as a proper exercise of the police power." *Id.* at 532 (citing *State v. Horne*, 622 S.W.2d 956, 957 (Mo. banc 1981)). Further, the function of the police power is to preserve the health, welfare and safety of the people by regulating all threats harmful to the public interest. *Id.* (citing *Craig v. City of Macon*, 543 S.W.2d 772, 774 (Mo. banc 1976)). The *Richard* court held that possession of a loaded firearm by an intoxicated individual poses a reasonable threat to public safety and thus, § 571.030.1(5) represented "a reasonable exercise of the legislative prerogative to preserve the public safety by regulating the possession of firearms by intoxicated individuals." *Id.*

Here, under the current version of § 571.070, no such reasonable exercise of the legislative prerogative to preserve public safety exists. The current version of § 571.070 creates a lifetime prohibition on *all* felons from possessing firearms under *all* circumstances. Unlike the statute analyzed in *Richard*, § 571.070 has no specific exception where the defendant possesses a firearm in the defense of himself or another. *Richard*, 298 S.W.3d at 532-533. Without such an exception, § 571.070 violates Article I, § 23 of the Missouri Constitution and the Second Amendment to the United States Constitution by banning the right to possess a firearm even for the purpose of self-defense or the defense of another even in a convicted felon's own home. There is no relationship, let alone a substantial one, between being convicted of *any* felony and being a danger to the public health, safety, morals or welfare if allowed to possess a firearm, at least under the limited circumstances of protecting oneself or others in one's own home.

Prior to 2008, § 571.070 was significantly different as to the time, place, and manner restrictions on felons possessing firearms. *See* § 571.070, L. 2008, H.B. No. 2034, § A. The previous version of § 571.070 limited dispossession of "concealable firearms" to those felons convicted of committing or attempting to commit a "dangerous felony", as defined by § 556.061. "Concealable firearms" were defined by § 571.010 as, "any firearm with a barrel less than sixteen inches in length, measured from the face of the bolt or standing breech." § 571.010(4), RSMo. Cum. Supp. 2007. § 556.061 defined a dangerous felony as:

> the felonies of arson in the first degree, assault in the first degree, attempted forcible rape if physical injury results, attempted forcible sodomy if physical injury results, forcible rape, forcible sodomy, kidnapping, murder in the second degree, assault of a law enforcement officer in the first degree, domestic assault in the first degree, elder abuse in the first degree, robbery in the first degree, statutory rape in the first degree when the victim is a child less than twelve years of age at the time of the commission of the act giving rise to the offense, statutory sodomy in the first degree when the victim is a child less than twelve years of age at the time of the commission of the act giving rise to the offense, and abuse of a child pursuant to subdivision (2) of subsection 3 of § 568.060, RSMo., and child kidnapping.

§ 556.061(8), RSMo. Cum. Supp. 2007.

Further, the prohibition against felons possessing such firearms had a time limitation only five years after conviction or release from confinement. *See* § 571.070, L.

2008, H.B. No. 2034, § A. Such a limited restriction could have been considered a reasonable time, place, and manner restriction. It prevented felons convicted of a dangerous felony from possessing certain firearms, specifically concealable, firearms for a five year period after conviction or release from confinement. Such a restriction may bear a substantial relationship to the threat of public safety, while balancing the individual's right to possess a firearm, albeit a "non-concealable" firearm, for the purpose of self-defense or the defense of others.[7] Nevertheless, there is no such protection under the current version of § 571.070 at issue here, and thus the statute is an unreasonable limitation on the right to bear arms as guaranteed by Article I, § 23 of the Missouri Constitution and the Second Amendment to the United States Constitution.

The current version of § 571.070 is also an unreasonable time, place, and manner restriction on an individual's right to keep and bear arms in that § 571.070 offers no procedure for convicted felons to have their right to bear arms restored as other similar statutes prohibiting the possession of firearms by felons in other states do. In footnote 4, this Court noted in *Richard* that four other states (Colorado, Mississippi, Montana, and Oklahoma) have a constitutional provision nearly identical to Article I, § 23 of the Missouri Constitution, and like Missouri, each of those states expressly recognized that

[7] In January 2012, a bill (HB 1482) was introduced in the Missouri legislature that would have created an exception to the unlawful possession law for those in possession of a rifle or shotgun who were not convicted of a "violent felony" (i.e. one that involved a weapon, use of force, or arson). To date, the bill has not been passed.

the right to keep and bear arms can be regulated pursuant to the state's inherent police power. *Richard*, 298 S.W.3d at 532, n. 4. Nevertheless, it is difficult to compare Missouri's § 571.070 with other jurisdictions because of the fundamental differences between each jurisdictions separate statutes and the existence of a procedure in other states to have the right to bear arms restored.

A majority of states have laws that explicitly allow felons to restore their right to bear arms. The most common means is application or petition to a state court or another state authority. *See* Conn. Gen. Stat. § 45a-100; N.Y. Correction Law § 702 (McKinney); Wash. Rev. Code § 9.41.040; Ariz. Rev. Stat. Ann. § 13-905; Ind. Code § 35-47-4-7; Miss. Code Ann. § 97-37-5; N.D. Cent. Code § 62.1-02-01.1; Ohio Rev. Code Ann. § 2923.14 (West); Or. Rev. Stat. § 166.274; 18 Pa. Cons. Stat. § 6105; W. Va. Code § 61-7-7; N.C. Gen. Stat. § 14-415.4; Tenn. Code Ann. § 40-29-101 (circuit court may restore full rights of citizenship, except handguns per *State v. Johnson*, 79 S.W.3d 522 (Tenn. 2002)); 430 Ill. Comp. Stat. 65/10 (certain felons may "appeal to the Director of State Police for a hearing upon . . . denial" of Firearm Owner's Identification Card); Ark. Code Ann. § 5-73-103 ("The Governor may restore without granting a pardon the right of a convicted felon . . . to own and possess a firearm . . . ."); Me. Rev. Stat. tit. 15, § 393 (application to the Commissioner of Public Safety); Mich. Comp. Laws § 28.424 (application to the concealed weapons licensing board); Ga. Code Ann. § 16-11-131 (application to Board of Public Safety upon receiving relief from the federal government).

Many of these states have imposed specific limitations on whose rights can be restored. New York, for example, will only issue a certificate of relief from disability to eligible felons. N.Y. Correction Law § 702 (McKinney). New York defines an eligible felon as "a person who has been convicted of a crime or of an offense, but who has not been convicted more than once of a felony." N.Y. Correction Law § 700 (McKinney).

A few states restore felons' rights automatically upon release, depending on the crime. Montana, for example, states in its constitution that "[f]ull rights are restored by termination of state supervision for any offense against the state." Mont. Const. art. 2, § 28. However, Montana imposes a statutory exception for crimes committed with a dangerous weapon. Mont. Code Ann. § 45-8-313. Under such circumstances, felons may, nevertheless, apply to their district court for a permit to possess firearms. Mont. Code Ann. § 45-8-314; *see also* Minn. Stat. § 609.165 (right of firearm possession automatically restored unless crime was one of violence and the order of discharge specifies prohibition, in which case felons must petition the court to have their rights restored); Idaho Code Ann. § 18-310 (right of firearm possession automatically restored except for treason and thirty-six enumerated offenses, in which case the felon may apply to the commission of pardons and parole).

More commonly, states restore rights automatically after a set amount of time. Louisiana, for instance, only applies firearm restrictions to those convicted of specific crimes, but the restriction ends ten years after completion of the punishment. La. Rev. Stat. Ann. § 14:95.1; *see also* N.M. Stat. Ann. § 30-7-16 (felon definition does not include those whose sentences have been completed ten years or more ago); S.D.

Codified Laws § 22-14-15 (varying lengths of time for restoration of firearm rights for violent crimes, possession of controlled substance, and domestic violence misdemeanors); R.I. Gen. Laws § 11-47-5 (right reinstated two years following conviction for domestic violence felony); Tex. Penal Code Ann. § 46.04 (firearm rights restored five years after release, but only permitted in a felon's own home); Alaska Stat. § 11.61.200 (only prohibits possession of firearms that can be concealed on one's person; prohibition expires ten years after completion of sentence); N.D. Cent. Code § 62.1-02-01 (rights restored ten years after release, if not restored through petition to the court prior).

Some states restrict restoration of felons' rights based on the nature of the crime. Arizona, for instance, permits felons convicted of serious offenses to apply to have their rights restored ten years after the end of their sentences. Ariz. Rev. Stat. Ann. § 13-905; *see* Ariz. Rev. Stat. Ann. § 13-706 for definition of serious offenses. Those convicted of dangerous offenses, however, are permanently prohibited from applying to have their rights restored. Ariz. Rev. Stat. Ann. § 13-905; *see* Ariz. Rev. Stat. Ann. § 13-704 for definition of dangerous offenses. *See also* Iowa Code § 914.7 (only those convicted of forcible felonies, felony controlled substance violations involving firearms, or felony weapons violations may not have their rights restored); S.C. Code Ann. § 16-23-500 (only prohibiting possession by felons convicted of a violent offense); Wyo. Stat. Ann. § 6-8-102 (only prohibiting possession by felons convicted of a violent offense or interfering with or disarming a peace officer); Tenn. Code Ann. § 39-17-1307 (unlawful for felons convicted of crimes involving the use of force, violence, or a deadly weapon or felony drug offenses to possess firearms, except handguns which are illegal for all

felons); N.D. Cent. Code § 62.1-02-01 (prohibiting only felons convicted of a crime involving violence or intimidation from possessing firearms).

Laws that lack a way to restore the right to bear arms have been challenged and struck down. A previous version of North Carolina's statute prohibiting firearm possession by felons did not allow for restoration of a felon's right to bear arms. N.C. Gen. Stat. § 14-415.1 (2009). This law came before the Supreme Court of North Carolina in *Britt v. State*, 681 S.E.2d 320 (N.C. 2009). The *Britt* court determined that the statute was in violation of North Carolina's constitution as applied to the plaintiff. *Britt*, 681 S.E.2d at 323. The court reasoned that it unduly restrained the plaintiff's constitutional right to bear arms. *Id.*; *see also Baysden v. State*, 718 S.E.2d 699 (N.C. Ct. App. 2011); *Wesson v. Town of Salisbury*, No. 13-10469-RGS, 2014 U.S. Dist. Lexis 54441 (D. Mass. 2014) (the portion of a Massachusetts law prohibiting gun possession by those who had violated any law regulating controlled substances to be an unconstitutional infringement on the Second Amendment right to bear arms). North Carolina's legislature enacted an amendment to the law the next year providing a means for felons to restore their firearm rights. 2010 N.C. Sess. Laws 108.

In addition to a majority of states, the federal government also allows felons' firearm rights to be restored. The federal government allows felons to apply to the Attorney General for relief from disability of firearm rights. 18 U.S.C § 925. If the Attorney General denies the application, petition may be made to the district court for review. *Id*. In states like Kentucky, felons who have been granted relief from their

firearm disabilities by the federal government are also granted relief by the state. Ky. Rev. Stat. Ann. § 527.040; *see also* Wis. Stat. § 941.29; Miss. Code Ann. § 97-37-5.

Other fundamental rights *are* eventually restored to felons under Missouri law. For instance, under Missouri law a convicted felon's right to vote is *automatically* restored once they are no longer confined under a sentence of imprisonment or once they have completed probation or parole, unless they are convicted for a felony involving the right of suffrage, in which case the felon is barred from voting indefinitely. §§ 115.133.2(1), (2), and (3); § 561.026. Additionally, a convicted felon may hold public office after the completion of his or her sentence or probation, unless the felony is connected to the right of suffrage, which disqualifies him or her from holding any elected or appointive office indefinitely. §§ 561.021(1)(1), (2).[8] Further, no State agency may deny a license to a felon on the basis of his conviction, although a felony conviction may be considered as a factor in the decision-making process. § 314.200. Thus, most convicted felons could go to law school, be licensed to practice law in the State of Missouri, and run for and win a Senate seat in the Missouri Legislature by one vote (i.e. their own vote), but they cannot possess a firearm for any reason. In Point II of Appellant's Amended Brief, the State suggests that felons are not permitted to possess firearms because felons are "lawless" and cannot be "entrusted with dangerous instrumentalities." (Appellant's Amended Brief, Page 37, citing *State v. Brown*, 571 A.2d 816, 821 (Me. 1990) and *People v. Blue*, 544 P.2d 385, 391 (Co. 1975). If Missouri

[8] With the exception of the office of sheriff, which no felon may hold. § 57.010.

were to follow this policy, then why would the State of Missouri allow some felons to vote, hold professional licenses, and hold public office?

The State also suggests that § 571.070 may be under-inclusive because some misdemeanor offenders have been shown to be at increased risk of being charged with new offenses involving firearms or violence. (Appellant's Amended Brief, Page 38). However, according the results of the cited study, "At the same time, it is important to note that most handgun purchases in this study - approximately 50% of those with a misdemeanor conviction at the time of handgun purchase and more than 90% of those with no prior criminal history – were not charged with new criminal activity after purchasing their handguns." Garen Wintemute, et al., *Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm-Related Criminal Activity Among Authorized Purchasers of Handguns*, 280 JAMA 2083, 2085 (1998). Thus, despite a possible statistical correlation between some misdemeanors and later violent/gun-related criminal activity, the majority of handgun purchasers went on to commit no further criminal behavior. Despite the rather old data (i.e., from 1998) collected in a different state (i.e., California) it is possible that § 571.070 is both over-inclusive in that it includes felonies that do not lead to an increased risk of future violent criminal behavior, and under-inclusive in that it does not include some misdemeanors that may. Either way, the State fails to establish that a relationship, let alone a substantial one, between being convicted of *any* felony and being a danger to the public health, safety, morals or welfare if allowed to possess a firearm, at least under the limited circumstances of protecting oneself or others in one's own home.

Missouri's prohibition on felons' ability to possess firearms is out of step with the national standard. Its lack of opportunity for felons to restore their rights and the excessive breadth of its restriction are contrary to Article I, Section 23 of Missouri's Constitution and the Second Amendment to the United States Constitution. Laws prohibiting firearm possession by felons are often specific to only a certain class of offenders, such as those convicted of violent crimes. Further, the majority of states and the federal government permit felons to restore their basic right to bear arms in some way, whether through application to the court, application to another state agency, or simply by passage of time. Missouri law does provide two avenues for restoration of rights for felons: gubernatorial pardon and expungement for *some* state felony convictions, as suggested by the state in its brief (Appellant's brief 21-22). Nevertheless, neither a gubernatorial pardon nor expungement is available to Mr. Merritt in this case since the alleged underlying criminal conviction was from a foreign jurisdiction (i.e., a federal conviction) and no Missouri authority has the power to grant pardons or expunge a federal conviction (L.F. 13-14). No doubt, a large percentage of other felons are subject to the same lifetime ban on the possession of any kind of firearm for any purpose in Missouri based on the current version of § 571.070.

In *Richard*, this Court cited *dicta* from *Heller*, which stated that a statute prohibiting the possession of firearms by felons is a "presumptively 'lawful regulatory measure'." *Richard*, 298 S.W.3d at 532 (citing *Heller*, 554 U.S. at 626-627 (2008)). In footnote 26, the *Heller* Court called these "presumptively lawful regulatory measures" as merely examples of the limits of the Second Amendment. *Heller*, 554 U.S. at 627, n. 26.

In citing this language, and several cases from foreign jurisdictions, the state appears to suggest that a felony conviction disqualifies an individual from asserting his or her right to bear arms (*see* Appellant's Amended Brief, Page 39, 42). Some federal courts have held that the language in *Heller* concerning "presumptively lawful" gun prohibitions makes it unnecessary to apply *any* level of scrutiny to those prohibitions because they are constitutional "exceptions" to the Second Amendment. *See United States v. Rozier*, 598 F.3d 768, 770 (11th Cir. 2010). Such a position should be rejected, as it ignores the level of scrutiny that should be applied in determining the constitutionality of a statute. It is not entirely clear as to what the United States Supreme Court meant in *Heller* when it called statutes prohibiting the possession of firearms by felons "presumptively lawful" regulatory measures, but it is just as unlikely that Justice Scalia authorized courts to completely forego constitutional scrutiny of such statutes. *Heller*, 554 U.S. at 626-627 (2008). It is difficult to compare § 571.070 to other statutes from foreign jurisdictions because § 571.070 is unique; it constitutes a complete lifetime ban on felons possessing any kind of firearm for any purpose. There are some federal courts that have determined that the language of *Heller* authorizes intermediate scrutiny. *See United States v. Marzzarella*, 614 F.3d 85, 96 (3rd Cir. 2010); *United States v. Skoien*, 614 F.3d 638, 641-642 (7th Cir. 2010); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 2011 WL 4551558, at 10 (D.C. Cir. 2011).

Using that standard, there is no substantial relationship between banning *all* convicted felons under *all* circumstances from possessing firearms *for life* and protecting the health, safety, morals or welfare of the public. The state presents no credible

evidence to suggest that all felons, from the moment of their conviction to death, pose a greater risk to the public health, safety, morals or welfare than intoxicated persons charged under § 571.030. Nor has the state presented any credible evidence that a convicted felon could not be entrusted with the possession of a firearm for the purpose of self-defense any more or less than an intoxicated individual charged under § 571.030. The state attempts to distinguish convicted felons from intoxicated individuals by suggesting that "drinking alcohol is not illegal, so an intoxicated person has not shown the same disregard for the rule of law that a felon has previously shown" (Appellant's Brief 19-20). First, the state assumes that the only method of intoxication in which a person may be charged under § 571.030.1(5) is by consumption of alcohol. This is not true. Intoxication could occur through the use or consumption of illegal drugs. In such a case, it cannot be reasonably suggested that the criminal defendant charged under § 571.030.1(5) has failed to show the same disregard for the rule of law that a felon has previously shown

Secondly, § 571.070 creates a complete lifetime ban on the possession of firearms based on a felon's past actions, whether violent or non-violent, whereas § 571.030.1(5) temporarily criminalizes the possession of firearms by intoxicated individuals based on the assumption that they are, at the time of possession, a danger to the public health, safety, morals or welfare because they present an acute and immediate risk that the firearm may be discharged in a careless or imprudent manner. It cannot honestly be stated that such a risk exists when a felon who was convicted of a non-violent offense possesses a firearm for the specific purpose of self-defense. In such a case, absent a

history of violence, there is nothing to suggest the careless, imprudent, or criminal discharge of such a firearm is likely to occur, let alone the same acute and immediate risk that an intoxicated person poses to the public health, safety, morals or welfare.

Again, perhaps Judge Fischer stated it best in his concurring opinion in *Richard*,

> Like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for any purpose whatsoever. *Heller*, 128 S. Ct. at 2786. The United States Supreme Court has noted *reasonable* limitations on the possession of firearms by felons and the mentally ill and laws forbidding the carrying of firearms in sensitive places, such as schools and government buildings. *Id*.

Richard, 298 S.W.3d 529, 534 (Mo. banc 2009)(J. Fischer, concurring opinion)(emphasis added).

Just as an individual's right under the Second and Fourteenth Amendments to the United States Constitution and Article I, § 23 should not be a right to keep and carry any weapon whatsoever in any manner whatsoever for any purpose whatsoever, the restriction against convicted felons carrying firearms should not be so complete as to restrict all felons from carrying any weapon at all for any purpose, whatsoever, for life. The restriction in § 571.070 is not reasonable and it has no real and substantial relationship to the protection of the public health, safety, morals, or welfare and it unjustifiably invades rights secured by Art. I, § 23 of the Missouri Constitution and under the Second and Fourteenth Amendments to the United States Constitution.

ARGUMENT III

To the extent that the Circuit Court's dismissal of Counts I, II and III could have been based on Article I, § 13 of the Missouri Constitution (the ban on retrospective laws, Mr. Merritt concedes the issue raised in Appellant's third point relied on in its amended brief because the ban on retrospective laws contained in Article I, § 13 does not apply to criminal statutes.

To the extent that the Circuit Court's dismissal of Counts I, II, and III could have been based on Article I, § 13 of the Missouri Constitution (the ban on retrospective laws, Mr. Merritt concedes that the issue raised in Appellant's third point relied on in its amended brief because the ban on retrospective laws contained in Article I, § 13 does not apply to criminal statutes. *State v. Honeycutt*, 421 S.W.3d 410, 413 (Mo. banc 2013).

CONCLUSION

Mr. Merritt, based on his argument in Point I of his Respondent's Amended Brief, or in the alternative based on his argument in Point II of his Respondent's Amended Brief, respectfully requests that this Court dismiss this appeal as improperly preserved, or in the alternative, affirm the order and judgment of the St. Louis City Circuit Court.

Respectfully submitted,

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Certificate of Service and Compliance

Pursuant to Missouri Supreme Court Rule 84.06, I hereby certify that on this 10th day of November, 2014**,** a true and correct copy of the foregoing brief was served via the e-filing system to the Office of the Attorney General at Jennifer.Rodewald@ago.mo.gov. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Missouri Supreme Court Rule 55.03 and that it complies with the page limitations of Missouri Supreme Court Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font. The word-processing software identified that this brief contains **14,630** words, including the cover page, signature block, and certificates of service and of compliance.

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